2001

Kent W. Holman and Alfred G. Kessler, dba Golden Spike Reality and Construction v. Blair W. Sorenson and Marjean Sorenson : Brief of Appellant

Utah Supreme Court

IN THE

STATE OF UTAH

KENT W. HOLMAN and ALFRED G. KESSLER, dba GOLDEN SPIKE REALTY AND CONSTRUCTION,

Plaintiff-Respondent,

vs.

BLAIR W. SORENSON and MARJEAN SORENSON,

Defendant-Appellant.

Case No. 14305

BRIEF OF APPELLANTS

Appeal from Judgment of the District Court of the
Third Judicial District
in and for Salt Lake County, State of Utah

Honorable James S. Sawaya,
Judge

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TEXTS

IN THE SUPREME COURT

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NATURE OF THE CASE

Plaintiffs (contractors) brought this action for breach of a construction contract with defendants (owners). Defendants counterclaimed for breach.

DISPOSITION IN LOWER COURT

The District Court found that both parties had indeed breached and awarded the contractor damages of $7,321. Defendants are "to be given credit for any amount paid Fashion Cabinets Manufacturing, Inc.," a materialman with a lien on the property in the amount of $1,523.40.

RELIEF SOUGHT ON APPEAL

Defendants-appellants seek a determination by this Court that the trial court erroneously awarded damages pursuant to its finding of mutual breach, and further seek the entry of an appropriate order either fixing damages or remanding for a proper determination of damages.

STATEMENT OF FACTS

Certain facts were not in dispute before the trial court. Mr. Blair Sorenson, the defendant owner, had never met either of the plaintiffs contractors until he observed them constructing a fourplex on Green Street in Salt Lake City (R. 4). He was planning to erect a fourplex on the same street and approached Alfred Kessler (who with Kent Holman constituted the partnership named Golden Spike Realty and Construction) to inquire whether they would submit a bid on it. An earnest money agreement dated April 3, 1973 (Ex. P-1) was entered by the parties in which Golden Spike agreed to build "a building . . . at 2303 Green Street, Salt Lake City, Utah, as per plans and spec." in consideration of $55,000 (Ex. P-1). Defendants paid a $100 earnest money deposit. On May 8, 1973, a Construction Agreement was entered (Ex. P-3 and P-4) for a contract price of $56,000, incorporating an intermediate agreement (Ex. P-2) to increase the price by $1,000 to cover increased costs.

Even before construction began in June, 1973, things did not go well between the parties. The differences between

Mr. Sorenson and the contractor continued until the next spring, when Mr. Sorenson terminated the contract. Much of the testimony in this case is concerned to establish that the "fault" was exclusively one party's or the other's. The trial court concluded that both parties were to bear the responsibility for the breach. Defendant does not challenge this conclusion on appeal, but asks only that this Court read the Findings of Fact and Conclusions of Law with the thought in mind that defendant is excoriated so thoroughly in them only because the trial court determined that plaintiffs suffered the greater damage and thus were entitled to draft the Findings and Conclusions. From the Findings as plaintiffs drafted them, it would be impossible to discern how plaintiffs breached.

The following is an outline of the principal disputes and differences between the parties:

Mr. Holman, one of the plaintiffs, testified that plaintiffs submitted their bid with the assumption that all of the fixtures in the existing house on the property and the shrubs and bushes would be salvageable by the demolition subcontractor, and that because the Sorensons removed some of these items the cost of demolition was increased by $300. Mr. Sorenson testified that this was never his understanding. It was not established exactly what items were removed or what their value might have been. It is clear from the record that the items, whatever they might have been, were removed <u>before</u>

plaintiffs took possession of the property and before construction. It is significant, too, that the contract contains none of the usual language to the effect that the contractor shall take possession of and have control over the site during construction.

Work did not actually commence on the jobsite until July 27, when excavation began. The contractor immediately struck water at a depth of three to four feet and work was halted while this problem was worked out. The underground water required changes in the plans with respect to the basement and required the installation of a retaining wall. The agreement between the parties was modified and reduced to a written agreement dated September 1, 1974 (Ex. P-8). Paragraphs 3 and 4 of this agreement set out specific prices for specific work to be performed by the contractor. There was no dispute concerning these items. The agreement also provided in paragraph 2 that Mr. Sorenson would "pay for both the labor and materials required to erect sufficient retaining walls to meet this new elevation and comply with city ordinances." There was substantial disagreement at trial as to whether this agreement obligated Mr. Sorenson to arrange and pay for backfill. The contractor in fact had the backfill placed by a subcontractor and the agreement itself speaks of "added backfill."

The Record is replete with plaintiffs' testimony concerning conduct by defendants which purportedly caused delays in the completion of the work. Because these matters go to the

finding of breach, which is not appealed from, they are not set out in detail. In general, however, plaintiffs claimed that their slow progress on the job arose from Mr. Sorenson's interference, while defendants contended that the slow progress was the result of plaintiffs' refusal to appear on the jobsite and get on with the work.

Despite plaintiffs' ostensible concern about delays "caused" by Mr. Sorenson, it is clear that they were not unusually concerned to perform the work themselves. Exhibit D-31, a calendar prepared by Mr. Sorenson from his diary, shows that the contractor was on the job for 13 of 25 working days in September, 1973, six of 27 in October, 11 of 26 in November, and 12 of 25 in December. January, 1974, was a better month--plaintiffs failed to work only five of 27 days. The work slowed considerably, however, during the winter and spring of 1974.

The situation became intolerable for Mr. Sorenson when he learned from his investigation pursuant to complaints and demands from subcontractors that even though Golden Spike had drawn $45,700, only $25,661 in lien waivers had been filed (R. 278) with the lender, American Savings & Loan. He then learned that, in breach of the contractor's specific promise to procure a bond for the job, no bond had in fact ever been obtained. In all, $7,946.44 in mechanics liens were filed against the property (excluding plaintiffs' lien of $7,981.71). (All liens filed are marked collectively as Ex. D-37.) All liens

were, moreover, for work performed before the contract was terminated on May 30. Each lien recites that materials were delivered or work performed pursuant to a contract with Golden Spike Realty and Construction.

All of the liens, except Fashion Cabinets Manufacturing, Inc.'s, were "precluded, finally and forever" by the judgment entered by the trial court (R. 530-31). If, however, these "precluded" subcontractors learn of the theory of quantum meruit (and appellants have very good reason to believe some have), then Mr. Sorenson cannot be assured that he will not be paying for their work twice, once to plaintiffs, and once directly.

Fashion Cabinets' lien was not precluded and the trial court gave Mr. Sorenson six months to pay it, with credit to be given against the judgment entered for the contractor.

With respect to the contractual relationship between the parties, there is one point that, for emphasis, defendants would like to make in this statement of facts, even though it will need repeating in the argument to follow, which concerns what was referred to at trial as "contract credits." During the course of the contract, before it was terminated, the contractor gave Mr. Sorenson credit against the contract price for work Mr. Sorenson performed. It was as if Mr. Sorenson was acting as a subcontractor, performing services and supplying materials to the jobsite. But instead of receiving payment for the work, he received credit against his obligation for the

contract price. These credits included work or materials relating to light fixtures, the mansaard roof, painting, floor covering, building plans, fire insurance, the fence, and an earnest money payment. At trial there was no disagreement over these items. Plaintiffs stipulated that all of them should properly be credited to defendants. The total credit for the items set out above was (as agreed at trial) $6,779.

The trial of this matter concluded on April 15, 1975. Seven weeks later, on July 9, 1975, in a letter to the parties' attorneys, the trial court "determined that defendants have breached the contract" and "that the plaintiffs have breached the contract." (This letter was not numbered by the clerk but is in the Record between 515 and 516 and is appended to this brief as Appendix A.) The court determined that the contractor had been damaged as follows:

Contract Price	$56,000
Allowable Extras	3,900
Total Amount Due Plaintiffs	$59,900
LESS:	
Credits Due Defendants	$ 6,779
Amount Paid Plaintiffs	45,800
	$52,579
Amount to Which Plaintiffs are Entitled	$ 7,321

With respect to defendants' damages, the court said:

> "[T]he above computation is inclusive of the amounts to which [defendants] have been damaged and to which they are entitled; therefore plaintiff is entitled to judgment for the above amount."

The court indicated that it realized inequities might occur because subcontractors had not been paid:

> "As indicated in chambers to counsel, I am concerned about the liens which remain unsatisfied against the property. I would therefore order that execution of the judgment be stayed for a period of six months from the date thereof, and at the end of that period the defendants to be given credit against the judgment for any liens which they have satisfied or which remain unsatisfied at that time." (emphasis added)

The judgment as drafted by plaintiffs' attorney took the court literally, allowing credit only for the one perfected mechanics lien. He ignored the court's plural reference to the claims of the subcontractors. Defendants are thus left exposed to the very real possibility that the subcontractors and materialmen may recover against them in quantum meruit for work for which defendants have already paid plaintiffs.

This award of damages is based on serious errors that should be corrected by this Court.

ARGUMENT

I

THE TRIAL COURT'S DAMAGE AWARD CLEARLY VIOLATES THE RULE THAT UPON A CONTRACTOR'S BREACH THE OWNER IS ENTITLED TO DAMAGES MEASURED BY HIS COST TO COMPLETE AND UPON AN OWNER'S BREACH THE CONTRACTOR MUST ACCOUNT FOR COSTS SAVED BY NOT COMPLETING.

The Restatement of Contracts, §346, has often been cited by this Court as a basis for computing damages upon the breach of a construction contract; see, e.g., Rex T. Fuhriman, Inc. v. Jarrell, 21 Utah 2d 298, 445 P.2d 136 (1968); Keller v. Deseret Mortuary Co., 23 Utah 2d 1, 455 P.2d 197 (1969).

This section provides:

> "(1) For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:
>
> (a) For defective or unfinished construction he can get judgment for . . .
>
> (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste;
>
> * * *
>
> (2) For a breach by one who has promised to pay for section construction, if it is a partial breach the builder can get judgment for the instalment due, with interest; and if it is a total breach he can get judgment, with interest so far as permitted by the rules stated in Section 337, for . . .
>
> (a) The entire contract price and compensation for unavoidable special harm that the defendant had reason to foresee when the contract was made, less instalments already paid and the cost of completion that the builder can reasonably save by not completing the work. . . ."

The trial court's award in this case is inexplicable in terms of these rules. Even if the court had found no breach at all on the part of the contractor, the award is excessive.

This error seems to have arisen from the court's misapprehension of the agreement between the parties at the time work was terminated. At trial the parties agreed on certain points concerning the contract, but the meaning of this agreement seems to have been misunderstood by the court below.

Both parties agreed that the contract price was $56,000. Plaintiffs agreed that defendants should be given credit against

this price for $1,000 for a fence on the property which was included in the original contract price, but which, it was later agreed, defendant would install at his own expense (P-11, R. 82). On plaintiffs' "Damage Recapitulation" (Ex. P-11, App. B), "contract credits to owner" are stated at $5,648. These credits are not itemized on P-11, but they are on defendants' damage summary;[1]

A.	Light Fixtures	$ 400
B.	Mansaard Roof	420
C.	Painting	1300
D.	Floor Covering	3178
E.	Building Plans	350
	These items total:	$5648

This corresponds to the "credits" admitted by plaintiffs.

All of these items were included as part of the original contract price, but were in fact provided, installed, paid for or performed by the owner, Mr. Sorenson. He was, accordingly, given credit for them against the contract price. Mr. Sorenson also claimed $31 for a fire insurance premium which he paid, and at trial the plaintiffs agreed he should be given credit for this amount (R. 225). Finally, it was agreed that Mr. Sorenson should be given credit for the $100 earnest money paid upon the execution of the Earnest Money Agreement (P-11, App. B).

So without consideration of extras or the costs

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[1] This summary, entitled "Accounting Summary by Defendants, Blair W. and Marjean Sorenson," was before the court and is in the Record but was (apparently) inadvertently not admitted as an exhibit. It is included in this brief as Appendix C.

plaintiffs'

[redacted] avoided by not finishing the work or the amount the Sorensons paid to complete the unfinished work, the parties agreed at trial that the status of the contract was as follows:

Contract Price		$56,000
Credits to Owner		
Earnest money	$ 100	
Fence	1000	
Light Fixtures	400	
Mansaard Roof	420	
Painting	1300	
Floor Covering	3178	
Building Plans	350	
Fire Insurance	31	
Total Credits	$6779	6,779
BALANCE		$49,221

At the risk of appearing to belabor the point, appellants must emphasize that these credits were agreed upon at trial as items included in the original contract price but furnished and paid for by the owner pursuant to an agreement that the owner (defendant) would get credit against the contract price in this amount. There can be no question about this. In a document entitled "Buyers Statement" (D-26), for example, which plaintiffs submitted to defendants in May, 1974, all of these credits except the $31 insurance premium are shown, which, together with the $100 earnest money payment equal $6,779.

The trial court apparently misunderstood all of this and found that

> "The Defendants are entitled to credits, including costs of completion, as against the [contract price

> plus extras] in the amount of $6,779, such amount being inclusive of the amount to which the Defendants have been damaged and to which they are entitled." (emphasis added) (Finding 9, R. 526)

The court then concluded:

> "3. That the Plaintiffs have breached the contract in these respects alleged by the defendants.
>
> 4. That the credits, including the costs of completion, to which the Defendants are entitled by virtue of such breach, were heretofore deducted from the contract price as specified in the Findings of Fact." (Conclusions 3 and 4, R. 527)

When the trial court gave defendants "credit" for $6,779, it gave them nothing more than what plaintiffs agreed they had coming for "contract credits", plus the $100 earnest money payment.[2] It gave them nothing for costs of completion, even though it purported to include such costs in the $6,779. Plaintiffs themselves conceded that there would be costs to

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[2]Mr. Holman described the "contract credits" as follows:

> Q. Now, can you explain to us what the item labeled Contract Credits to the Owner consists of?
>
> A. Yes. They are credits given to the owner for items that he took on and did on his own such as floor coverings, the shingling, the painting and I think there was a copule other miscellaneous things. I don't see them on my list that itemizes them now.
>
> Q. Was that figure arrived at after negotiations between you and Mr. Sorenson? . . .
>
> A. On the different items--on each of the different items the amount for floor covering was agreed on. It was a matter of the cost breakdown. That's what was allowed for in the cost breakdown on the place and so that's what he got. The painting, that's what was allowed in the—in the cost breakdown and that's what he received there. . . ." (R. 99)

complete the work in the amount of $1,807.50, which did not, apparently, include plaintiffs' profits.

Perhaps the trial court's error can best be summarized by reference to Restatement of Contracts, § 346. Upon an owner's breach, a contractor is entitled to

> "[1] the entire contract price . . . less [2] installments already paid and [3] cost of completion that the builder could reasonably save by not completing the work." (emphasis added)

The contract price was in dispute in this case only because the parties could not agree on "extras". The parties did agree that the contract price was $56,000 less $6,679 for credit to defendants for work Sorenson performed that was originally included in the $56,000 contract price. Thus, the contract price was:

$49,321 plus Extras.

It was agreed that the amount paid plaintiffs was $45,700 disbursed as progress payments plus $100 for the earnest money payment. Thus, the installments paid were $45,800.

The costs saved by plaintiffs in not completing was asserted by the plaintiffs themselves to be $1,807.50. Thus plaintiffs' damages for defendants' breach was

Contract Price less Installments Paid less Costs Saved equal Damages

($49,321+Extras) - ($45,800) - ($1,807.50) =($1713.50+Extras)

Giving plaintiffs the extras of $3,900 as found by the trial court, the total damages for plaintiffs are $5613.50.

This is without considering cost of completion damages that defendants are entitled to from plaintiffs' breach.

Thus, when the "contract extras" are properly understood, it is clear that the judgment of $7,321 is $1707.50 high even if there had been no ruling that plaintiff breached. The judgment entered does not account for the alleged costs of $1807.50 plaintiffs saved by not completing the contract. In fact, the judgment would be in error by exactly this amount except that the $100 earnest money fee was added both to "credits due defendants" and "amount paid plaintiffs" in the court's letter opinion. (App. A)

The most vivid illustration of the trial court's error is plaintiffs' own Damage Recapitulation (Ex. P-11). As contained in the Record, the first sheet of this exhibit contains certain modifications in pencil to reflect what plaintiffs themselves admitted were errors or omissions in the original typewritten version. On the Damage Recapitulation, the total contract price is shown at $56,000, the total extras claimed are $4760.99, defendants are given credit for the fence in the amount of $1000, together with "contract credits" in the amount of $5648, for a total contract credit of $6648 (which does not include the $31 insurance premium). Finally, plaintiffs alleged that the costs they saved by not completing the work is $1807.50. Thus, the total amount plaintiffs claimed as damages at trial was $6505.49.

In spite of this, the trial court awarded plaintiffs judgment in the amount of $7321.

II

DEFENDANTS ARE ENTITLED TO DAMAGES FOR THE COSTS THEY INCURRED IN COMPLETING THE APARTMENT AND CORRECTING DEFECTS.

Because the trial court found that plaintiffs breached the contract, defendants should be given credit for the costs they incurred in completing the work and correcting defects. See Rex T. Fuhriman, Inc. v. Jarrell, supra, Keller v. Deseret Mortuary Co., supra, Restatement of Contracts, § 346(1)(a).

At trial, many of the items the defendants claimed as costs to complete the project were disputed, either as to their necessity or as to their cost. Nevertheless, on a great many of these items, the evidence, as shown by the record, clearly preponderates for defendants. It is not plausible that the trial court determined that there were no costs of completion, for to do so, it would have to disregard and disbelieve not only all of the extensive evidence presented by defendants concerning cost of completion, but also plaintiffs' admissions that they would have incurred costs of $1807.50 to complete the apartments. It would appear that the trial court's failure to give defendants credit for their costs of completion did not arise from its view of the evidence, but from a fundamental misapprehension of what the contract credits were or the law of damages. In any event, the trial court did not enter specific findings with respect to defendants' claim for completion costs, but merely stated that these costs were included in

the $6779 "credit" that was given defendants in the judgment. Thus, it appears that the trial court acknowledged the defendants were entitled to an award for such damages.

These damages, as presented by defendants, are as follows:

Payment to Rocky Mountain Trane

At the trial, defendants proffered a check to show that they had paid Rocky Mountain Trane the sum of $1000. Rocky Mountain Trane was a subcontractor, contracting directly with plaintiffs, that had furnished labor and materials for the heating and air conditioning system in the apartments. The obligation to this subcontractor was the plaintiffs'; nevertheless defendants paid $1000 toward it. Plaintiffs stated that they would concede the credit.

Mr. Holman, called as a rebuttal witness, stated:

> "If he has a check to show that he has paid that part of the payment, then we have got no contention with it." (R. 421)

Items Admitted by Plaintiffs as Necessary for Completion

In their Damage Recapitulation (Ex. P-11) on Schedule D attached thereto, plaintiffs set out the following items as their costs saved by not completing the contract:

1.	Blacktop and Tree Removal	$ 800.00
2.	Four Sets of Appliances ($177.50 ea.)	710.10
3.	Storm Doors	27.50
4.	Four Hood Fans	120.00
		$1657.50

To this, on his direct examination, Mr. Holman stated that an additional $150 should be added for labor involved in final clean-up on the jobsite. This item is penciled in on Schedule D of Exhibit P-11.

It should be remembered that these are plaintiffs' costs saved, and would not include the profits they anticipated for doing this work. The Record shows that defendants incurred and paid costs of $900 to Staker Paving for placing blacktop, incurred and paid costs to Diamond Tree for removal of stumps in the amount of $157, paid $710.60 for ranges, $133.75 for range hoods, $125.40 for disposal units. With respect to these items, defendants had a small quibble with the reasonableness of the $900 figure for asphalt (R. 418, 419); and with respect to the other items asserted only that they (plaintiffs) could have gotten them cheaper and that they would have installed them had the contract not been breached (R. 419, 420). Of course, this is no defense under the usual rules for computing damages set out above.

Defendants also presented testimony by a contractor who stated that he submitted a bid for cleanup in the amount of $340 and that this bid was reasonable. He did not perform the work, but his testimony did establish a reasonable figure for the work performed by defendants. Plaintiffs asserted that this figure was not reasonable (R. 421) and that:

> "The costs on the cleanup of those and we have contracted those with a--with one of the handicapped agencies. I don't recall which one it

> was but they came out and cleaned the units completely for $25 per unit. In the cases where we are running short of funds ourselves and it looks like we are not going to any more than break even on the project Mr. Kessler, myself and our wives go down and clean them in the evening times ourselves at our own cost and expense." (R. 420)

With respect to storm doors, defendants introduced a bid for four of them in the amount of $277.76. Plaintiffs contended that only one storm door was shown on the plan and that they could have purchased it for $27.50. The state of the plans in this respect was in dispute. It should be remembered that the building was a fourplex.

The sum of all of these items that plaintiffs conceded were necessary to complete the project is $2644.51. There was dispute about the reasonableness of the prices for some of these items, but defendants were in the position of finishing the contract after plaintiffs' breach and therefore would not have the advantages with respect to price that a general contractor would.

Other Items

Other items claimed by defendants as necessary to complete the project were disputed by plaintiffs on the grounds that they were defendants' obligation under the contract or that the damage was defendants' fault or that the work had already been performed by plaintiffs or changes

made by defendants were unnecessary.[3] Appellant does not think it appropriate to reargue the evidence to this Court. They would point out, however, that the trial court's Findings and Conclusions and Judgment make clear that the lower court gave no consideration to these claims by defendants, for if it disregarded the cost of those items which plaintiffs themselves admitted were necessary to complete the contract, then it must have failed to consider any of the disputed claims.

It should be noted that William Hargreaves, a licensed engineer and building designer with some thirty years experience, testified that these disputed items were either uncompleted or unsatisfactory. Mr. Hargreaves had much less interest in the outcome of this litigation than did Mr. Holman and Mr. Kessler, who contradicted his testimony on their own behalf.

It should be noted, too, that Mr. Sorenson claimed $900 for the time he spent completing the work. His time was charged at $6.37 per hour, which he makes as an electronic technician at Hill Air Force Base. Plaintiffs suggested that

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[3]For example, defendants claimed and proved the cost paid for repairing a sidewalk broken up in the course of plaintiffs' construction work (R. 209-212). On rebuttal, plaintiffs contended that this was an "offsite" improvement and thus not their responsibility under the contract (R. 422). Again, defendants claimed and proved the cost of repairing leaks and caulking so that the plumbing would pass final inspection (R. 206-207). Plaintiffs claimed that their subcontractor "stood ready to obtain the final inspection on that at any time." (R. 421)

perhaps this time was inefficiently spent, but, of course, did not contradict the actual number of hours and the hourly rate which Mr. Sorenson claimed. In any event, Mr. Sorenson is entitled to damages for the time and inconvenience caused him, and the sum of $900 is not unreasonable.

The total amount of these other items claimed by defendants to complete or repair the project is $7173. In view of Mr. Hargreaves' testimony, it seems incredible that, had these claims been given proper consideration, defendants would have recovered for none of them. It is respectfully submitted that the matter should be remanded for a proper determination of these items with specific Findings and Conclusions as to which are and which are not allowed.

III

THE TRIAL COURT IMPROPERLY AWARDED PLAINTIFFS "EXTRAS" IN THE AMOUNT OF $3,900.

The trial court's award of an even $3900 for extras cannot be reconciled with the items claimed as extras by plaintiffs or admitted as extras by defendants. That is, no combination of these items will total the even sum of $3,900. The trial court made no findings as to which items were deemed extras and which were not.[4] Accordingly, the following argument goes not to the trial court's Findings

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[4]Plaintiffs claimed extras worth $4760.99 (P-11, App. B). Defendants admitted extras worth $794.13 (App. C).

and Conclusions, but directly to plaintiffs' claims.

On Schedule C of plaintiffs' Damage Recapitulation (Ex. P-11), plaintiffs claim a total sum of $1492.08 for "extras and charges authorized verbally and for which defendant agreed to sign change orders and pay." These include doors in basement in the amount of $300[illegible], drywall in basement for $600,[5] extra blacktop for $375, scaffold in the amount of $24 and door casings for closets in the amount of $160 (R. 95-98). With respect to all of these items, except the scaffold, Sorenson claimed that they were plaintiffs' obligation under the original plans and specifications, that he consistently so maintained to plaintiffs when he was approached concerning them. Plaintiffs, of course, dispute this and claim that he verbally authorized these changes.

The construction contract provides:

> "6. OWNER will not be liable for any charges for extra work performed or materials furnished by CONTRACTOR in the execution of this contract unless OWNER authorizes or approves in writing such extra work and material. It shall be the responsibility of the CONTRACTOR to obtain from

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[5]The dispute over the drywall in the basement is typical. Mr. Holman testified:

> "Our original bid on the basement did not include any drywall on the petition walls in the basement. Mr. Sorenson had indicated he would put that up himself and then later asked us if we would go ahead and do it to finish out the building because he didn't have time to do it and we quoted him a price of six hundred dollars to do that and we told him we wouldn't do it without the change order being signed. He refused to sign it and we didn't follow through but it would have to have been done in order to, you know, complete it according to his wishes." (emphasis added) (R. 95, 96).

OWNER such written authority or approval." (Ex. P-3)

Defendants cannot be bound by these claimed "verbal" extras, since it was plaintiffs' responsibility to reduce any agreement concerning them to writing. There is no finding of fact that would support a conclusion that defendant is estopped from asserting this provision in the contract by his conduct or has waived his right to rely on the contract.[6] Accordingly, the contract should be honored, and any award of damages for these items should be vacated by this Court.

Defendants also claimed "Extras and Changes Made Necessary By Defendants' Conduct." These included

1.	Kitchen Plan	$100
2.	Electrical Plan	100
3.	Changes in appliances and addition of dishwasher	560
4.	Hookup of dishwasher, plumbing and electrical	160
5.	Extra cost to hang light fixtures	150
6.	Increased costs of demolition	300

Even if plaintiffs' assertions that defendants' conduct was culpable is credited, there was absolutely no

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[6]As the testimony quoted in the last footnote indicates, plaintiffs made no showing that defendants waived or were estopped from asserting paragraph six of the contract, c.f., Harrington v. McCarthy, 91 Idaho 307, 420 P.2d 790, nor did they show any actual agreement between the parties either as to price or as to whether the work was included in the bid for the basement work. See Wilson v. Keefe, 309 P.2d 516, 150 C.A.2d 178. (The architect, Mr. Hargreaves, indicates that the drywall was included in his plans (Ex. D-41)). Finally, there is no pretense of showing that this was a reasonable value for the work, c.f., Harries v. Valgardson, 19 Utah 2d 433, 432 P.2d 58.

foundation laid for any of this testimony. With respect to the kitchen plan, for example, plaintiffs claim "administrative expenses" of $100, but specified in only the vaguest way what these administartive expenses might be, how they were incurred, or what time the administrators spent because of the changes in the kitchen plan. The same is true for all the other items enumerated on Schedule B of plaintiffs' Damage Recapitulation (R. 89-94). Bare allegations of amounts--with no supporting documents nor supporting testimony as to time spent, rates and the like--were introduced by the plaintiffs.[7] The trial court ruled that these flaws in the testimony went to its weight--not its admissibility. Appellants do not disagree with this ruling in itself, but would respectfully submit that it goes as well to its sufficiency.

The maximum amount that should have been awarded to plaintiffs as extras was $1898.91.

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[7]The testimony with respect to a $150 extra cost to hang light fixtures is typical:

> "Q. Can you explain the genesis of item number five?
> A. Yes. Mr. Sorenson went and picked out his light fixtures which was part of the electrical contractor's bid and purchased them directly himself and the--by taking the profit away from the electrical contractor when you don't buy your light fixtures through them they then in turn charge you a fee for the hanging of each light fixture and this represents the charge for hanging the light fixtures that Mr. Sorenson did not purchase through them." (R. 94)

If the electrical contractor charged an extra $150 for Mr. Sorenson's conduct, he or his statement should be before the Court. Mr. Sorenson was given $400 credit for light fixtures. The "extra" represents a 37.5% markup.

IV

DEFENDANTS SHOULD BE AWARDED A SETOFF FOR THEIR PAYMENTS TO FASHION CABINETS AS PROVIDED BY THE TRIAL COURT'S JUDGMENT.

Certain checks made payable to Fashion Cabinets, Inc., and a copy of a release of lien filed by Fashion Cabinets are attached to this brief as Appendix D. These payments were made pursuant to the provisions in the trial court's judgment that defendants would have six months to make them, and upon the payment would be given credit against the judgment for them. The judgment amount should be reduced accordingly.

V

BECAUSE DEFENDANTS MAY BE LIABLE TO CERTAIN SUB-CONTRACTORS WHOM PLAINTIFFS DID NOT PAY, THIS COURT SHOULD DECLARE THE STATUS OF PLAINTIFFS AND DEFENDANTS UNDER THE JUDGMENT WITH RESPECT TO SUCH CLAIMS.

The trial court ruled that all lien claims other than the claim of Fashion Cabinets were forever barred and precluded against the property in question. Nevertheless, defendants have reason to believe that certain subcontractors whom plaintiffs did not pay are claiming or may claim damages against defendants in quantum meruit. The judgment of the trial court is ambiguous in this regard since it might be construed as res judicata with respect to any claim over against plaintiffs that defendants might assert for liability

to the subcontractors. These claims were presented by defendants to the trial court as a credit or setoff against any liability to plaintiffs and their disallowance by the trial court might be construed as a final determination of plaintiffs' liability to defendant for them.

This Court should declare that such claims by the defendants against plaintiff arising from such liability to subcontractors are not barred by the judgment.

SUMMARY

Assuming that plaintiffs in fact prevailed in the trial court on each and every claim they made to it, the damages awarded were still in error, for the trial court neglected to subtract from defendants' damages the amount plaintiffs saved by not completing the project. This amount was admitted by plaintiffs themselves. Considering such costs saved and disregarding any award that might be made to defendants for plaintiffs' breach, an accounting of the damage award should look like this:

Original Price		$56,000.00
Less Contract Credits	6,679.00	
Plus Extras	3,900.00	
Final Contract Price		$53,221.00
Payments:		
Disbursements	45,700.00	
Earnest Money	100.00	
Total Payments	45,800.00	
Costs Saved as Admitted by Plaintiffs	1,807.50	
JUDGMENT AMOUNT:		$ 5,613.50

Even if the costs of completion were nothing--which contradicts the trial court's specific conclusion that plaintiffs breached--the judgment of the trial court is still in error by $1707.50.

However, it is clear that the trial court intended that defendants be awarded damages for plaintiffs' breach. These damages are equivalent to the cost defendants incurred in completing the contract in accordance with the contract. If the trial court had not intended such a result, its conclusion that plaintiffs, as well as defendants, had breached the contract would mean nothing.

Giving defendants the $1,000 payment to Rocky Mountain Trane and the actual costs of the items plaintiffs admitted, except as to price, defendants' damages are $3644.51. To this must be added whatever amounts the finder of fact should have found from among the numerous disputed items that defendants claimed. Even if defendants prevailed on only one fourth of these items, the total cost of completion would be approximately $5350.

CONCLUSION

Defendants respectfully submit that defendants' damages should be adjusted to reflect plaintiffs' costs saved by not completing the work and that the extras should be adjusted to reflect the contract and the weight of the evidence. From these damages for plaintiffs, defendants damages for cost of completion should be subtracted. It is respectfully

submitted that these costs of completion require more consideration than the trial court gave them and should be remanded for further determination as to which costs will and which will not be allowed.

Respectfully submitted,

PRINCE, YEATES, WARD & GELDZAHLER
J. Rand Hirschi
455 South Third East
Salt Lake City, Utah 84111
Attorneys for Defendants-Appellants

JAMES S. SAWAYA
JUDGE
THIRD JUDICIAL DISTRICT COURT
SALT LAKE CITY, UTAH 84111

#21178

July 9, 1975

Joel M. Allred
Attorney at Law
345 South State Street
Salt Lake City, Utah 84111

Hollis S. Hunt
Attorney at Law
510-Ten Broadway Building
Salt Lake City, Utah 84101

Re: Golden Spike vs. Sorenson

Gentlemen:

In the above matter the Court has determined that the defendants have breached the contract and caused the delay in construction as alleged by the plaintiff; that for the foregoing the plaintiff has been damaged and is entitled to recover the following:

Contract price	$56,000.00
Allowable extras	3,900.00
Total amount due plaintiff	$59,900.00
LESS:	
Credits due defendants	6.779.00
Amount paid plaintiff	45,800.00
	$52,579.00
Amount to which plaintiff is entitled	$7,321.00

It is the Court's further opinion that the plaintiffs have breached the contract in the respects alleged by thedefendant s, however the above computation is inclusive of the amounts to which they have been damaged and to which they are entitled; therefore plaintiff is entitled to judgment for the above amount with no attorney fees being awarded to either party, and each party to bear its own costs.

As indicated in chambers to counsel I am concerned about the liens which remain unsatisfied against the property. I would therefore order that execution of the judgment be stayed for a period of six months from date thereof, and at the end of that period the defendants to be given credit against the judgment for any liens which they have satisfied or which remain unsatisfied at that time.

Mr. Allred is requested to prepare and submit Findings of Fact, Conclusions of Law and Judgment consistent with the foregoing within ten days from the date hereof.

ATTEST
W. STERLING EVANS
CLERK

Sincerely,

TOTAL CONTRACT PRICE		$56,000.00
Offset - Credit for fence (to be completed by owner)	$1,000.00	
Paid through May 30, 1974 (including Earnest Money)	45,800.00	
		46,800.00
Balance Due		9,200.00
Charges for extras:		
(1) Extras and changes agreed to in writing (Schedule A)	1,627.63	
(2) Extras and changes made necessary by Defendants conduct (Schedule B)	~~1,492.08~~ 1,370 cc	
(3) Extras and changes authorized verbally for which Defendant agreed to sign change orders and pay (Schedule C)	~~2,870.00~~ 1,492.08	
(4) Extra costs incurred by reason of incorrect plot plan	271.28	
		~~5,460.99~~ 4,760.99
Total Extras		
Balance due if job had been completed		~~$14,660.99~~ 13,960.99
Contract credits to owner	5,648.00	
Less reasonable cost of completion (Schedule D)	~~1,657.50~~ 1807.50	
LESS:		
Total credits and cost of completion		7,305.50
		~~$ 7,355.49~~ 6,655.49 150 6,505.49
PLAINTIFF'S DAMAGE		

Plus interest at 1½ per month

SCHEDULE A

EXTRAS AND CHANGES AGREED

TO IN WRITING

1.	Costs connected with new elevation of building above grade and to comply with city ordinances. (September 1, 1973 Agreement, paragraph 2)	$1,029.50
2.	Changes specified in September 1, 1973 Agreement, paragraph 3.	315.71
3.	Changes specified in September 1, 1973 Agreement, paragraph 4.	147.42
4.	Survey, supplement to general building contract, 11 (f).	135.00
	TOTAL	$1,627.63

Certain other changes were made without involving increased costs. (ex. change in siding, change of shingles)

SCHEDULE B

EXTRAS AND CHANGES MADE NECESSARY

BY DEFENDANT'S CONDUCT

1.	Kitchen plan	$ 100.00
2.	Electrical plan	100.00
3.	Change in appliances and addition of dishwasher	~~1,260.00~~ 560.00
4.	Hookup of dishwasher, plumbing and electrical	160.00
5.	Extra cost to hang light fixtures	150.00
6.	Increased cost of demolition	300.00
	TOTAL	$2,070.00 700 1,370.00

SCHEDULE C

EXTRAS AND CHANGES AUTHORIZED VERBALLY AND FOR WHICH DEFENDANT AGREED TO SIGN CHANGE ORDERS AND PAY

1.	Doors in basement	$300.00
2.	Drywall in basement	600.00
3.	Extra black top	375.00
4.	~~Window~~ and scaffold	~~57.08~~ 24.00
5.	Door casings for closets	160.00
	TOTAL	$1,492.08

SCHEDULE D

COSTS OF COMPLETION

1.	Black top and tree removal	$800.00
2.	Four sets of appliances $177.50 ea.	710.00
3.	Storm doors	27.50
4.	Hood fans	120.00
	TOTAL	$1,657.50

150.00 labor

1,807.50

#221 808

ACCOUNTING SUMMARY
BY DEFENDANTS, BLAIR W. & MARJEAN SORENSON

I.	ORIGINAL CONTRACT PRICE		$56,000.00
II.	EXTRAS (Agreed to by Defendant Sorenson)		
	A. Survey	$135.00	
	B. Basement Doors	172.00	
	C. Waterproofing basement	315.71	
	D. Double studded walls in basement (to run heat ducts, never used)	147.42	
	E. Scaffolds	24.00	
			+ 794.13
III.	CREDITS (Claimed by Defendants)		
	A. Light fixtures	400.00	
	B. Mansaard Roof	420.00	
	C. Painting	1,300.00	
	D. Floor covering	3,178.00	
	E. Building Plans	350.00	
	F. Fire insurance	31.00	
	G. Fence	1,000.00	
	H. Earnest Money	100.00	
	I. Utilities on construction site	120.11	
	J. Delay in completion ($10.00 per day at 146 days, 1/5/74 thru 5/30/74	1,460.00	
	K. Interest on construction loan from 1/5/74 thru 5/30/74	1,333.73	
	L. Liens and suits by subcontractors performing prior to May 30, 1974 (minus Plaintiffs' liens for $7,981.75)	8,321.62	
	M. Work completed and paid for by Defendant after May 30, 1974 to point of occupancy:		
	1. Blacktop	930.00	
	2. Ranges (4)	710.60	
	3. Range Hoods (4)	133.75	
	4. Disposals (4)	135.41	
	5. Removal of stumps	157.00	
	6. Final clean-up	540.00	

P7 — D25 — D26 — D25 — D1 D

7.	Plumbing (final)	33.17 Pd	
8.	Sheetrocking basement partition	483.20	
9.	Sound board which could not be installed due to construction status	88.00	
10.	Part payment to Rocky Mtn. Trane (Heating & Air)	1,000.00 OK	
11.	Sidewalk on street (city sidewalk broken by Plaintiff	200.00	
12.	Time of Defendant for labor in completion of job (supervision and administration at $6.37 an hour)	900.00	$5,041.12

N. Uncompleted work yet to be done according to contract:

1.	storm doors (4)	277.76	
2.	Finish grade on landscaping	340.00	
3.	Window well gas meter	175.00	
4.	Hole in brick around gas line	5.00	
5.	Pointing up brick	35.00	
6.	Install water extension on roof	95.00	
7.	Splash blocks for water drain (4)	13.62	
8.	Access doors (4) for tub plumbing	125.00	
9.	Finish carpentry in all apartments:		
	a. Door hardware install		
	b. Adjust pocket doors #1 & 2		
	c. Adjust pocket doors 1/2 baths #1, 2 &3 (binds won't lock)		
	d. Adjust folding doors in all master bedrooms		
	e. Replace knobs on byfolding doors in #1 & 2	572.00	$1,638.38

O. Unsatisfactory Work as per Contract done prior to May 30, 1974:

1.	Replace #4 window well (bent and damaged) Repair #2 window well not anchored to building	65.00	
2.	Replace #4 front door, hole in center	75.00	
3.	Replace pocket door #4 master bath, nails gouged door	65.00	
4.	Brick needs washing (line deposit)	70.00	
5.	Smooth & repair around electrical switch & plug corners in all rooms	400.00	

6.	New formica drain board #4 kitchen, edges chipped	125.00	
7.	Replace patios #1 & 2, no compaction and concrete above ground level	200.00	
8.	Square & level all patio steps	75.00	
9.	Replace front steps and sidewalks (put in 2 steps rather 3 as per plans)	725.00	
10.	Repair cracked retainer wall (broken by Plaintiff's caterpillar)	180.00	
11.	Pipe repair where sheetrocker drove nail in pipe & sheetrock	122.00	
12.	Repair pitted concrete floor #3 and 4	600.00	$2,702.00

P. Work Done not in Accordance with Plans & Specifications of Contract by Plaintiff:

1.	No sheet used under mansaard roof as per specs. Visquell used instead	434.80	
2.	T-III exterior fir panels used rather than rough sawed cedar as per specs	55.00	
3.	Trane 80,000 BTU rather 82,000 Lennox or equivalent as per specs	~~1,252.00~~ 900 — 1052.00	BID to replace 4 furnaces credit for other furnaces.
4.	(4) medicine cabinets 42" rather than 48" in all baths as per specs	20.00	

Q. Attorneys Fees and Court Costs Incurred by Defendant:

1.	Attorneys fees up to date of trial (based upon $30.00 per hour, remainder of fees at same rate)	1,400.00	
2.	Court costs to be determined at completion of trial		

-$31,207.82

IV. TOTAL AMOUNTS CLAIMED BY DEFENDANTS

A.	Original Contract Price		$56,000.00
B.	Extras		+ 794.13
C.	Credits:		
	(A) Light fixtures	400.00	
	(B) Mansaard roof	420.00	
	(C) Painting	1,300.00	
	(D) Floor covering	3,178.00	
	(E) Building Plans	350.00	
	(F) Fire Insurance	31.00	
	(G) Fence	1,000.00	
	(H) Earnest Money	100.00	
	(I) Utilities	120.11	
	(J) Delay in completion	1,400.00	
	(K) Interest from delay	1,333.73	
	(L) Liens and suits	8,321.68	
	(M) Work completed by Defendant	5,041.12	
	(N) Uncompleted work	1,630.38	
	(O) Unsatisfactory Work	2,702.00	
	(P) Work Not in Accordance	2,411.80	
	(Q) Attorneys Fees	1,400.00	
			-$31,207.82
	BALANCE		$26,586.31
D.	Amount Disbursed to Plaintiffs by American Savings & Loan		$45,700.00
	Minus balance of credits, extras and original contract price		26,586.31
			$19,113.69

RELEASE OF LIEN

2783399

(Corporation)

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned Corporation for and in consideration of the sum of Fifteen Hundred Twenty Three and 40/100---------- Dollars, the receipt of which is hereby acknowledged, does hereby certify that that certain claim of lien heretofore filed by said Corporation in the Office of the County Recorder of Salt Lake County, State of Utah in Book 3607 Page 81, as Instrument No. 2628340 dated the 8th day of January 1976, is hereby fully paid, satisfied, discharged and released.

IN WITNESS WHEREOF, the undersigned Corporation has caused these presents to be executed by its officers hereunto duly authorized and its corporate seal to be hereunto affixed this 8th day of January 1976,

By _____
President

9 1/2 3

Golden Spike Realty

Lots 2 & 3 Blk 14 Forest Dale of Blk 43

10 AC plat A

Recorded FEB 5 1976 at 11 39 A m.
Request of Jashion Cabinet
KATIE L. [illegible] Recorder
Salt Lake County, Utah
$ 3.00 By _____ Deputy
REF. 21-24-9

ATTEST:

19 31-61/1240

PAY TO THE ORDER OF _____ $ 1497 41/100

_____ DOLLARS

TRACY COLLINS BANK AND TRUST — SUGARHOUSE OFFICE — SALT LAKE CITY, UTAH 84106

FOR _____

1:1240:0061: 05 22 071.0:" "0000 14971 1:"

1187-5

No. 64-295

BLAIR W. OR MARGENE SORENSON
1306 HARRISON AVENUE
SALT LAKE CITY, UTAH 84105

Sept. 1 19 75 31-61/1240

PAY TO THE ORDER OF Forbes Cabinets $ 25 00/100

Twenty Five and No/100 DOLLARS

TRACY COLLINS BANK AND TRUST — SUGARHOUSE OFFICE — SALT LAKE CITY, UTAH 84106

FOR on Bidwell Spike Resist + Crest accts for yard 2303 Dunn St.

1:1240:0061: 05 22 071.0:" "000002500:"

No. 64 296

BLAIR W. OR MARGENE SORENSON
1306 HARRISON AVENUE